

SENATE BILL REPORT

SB 5140

As of January 21, 2018

Title: An act relating to enacting the equal pay opportunity act by amending and enhancing enforcement of the equal pay act and protecting worker communications about wages and employment opportunities.

Brief Description: Concerning enforcement of the equal pay act and worker communications about wages and employment opportunities.

Sponsors: Senators Cleveland, Keiser, Frockt, Ranker, Conway, Nelson, Takko, Darneille, Hunt, Palumbo, Chase, Saldaña, Liias, Rolfes, McCoy, Kuderer, Billig, Wellman, Mullet, Carlyle, Hasegawa and Pedersen.

Brief History:

Committee Activity: Commerce, Labor & Sports: 2/01/17, 6/28/17.

Labor & Commerce: 1/10/18.

Brief Summary of Bill

- Modifies the Equal Pay Act to prohibiting discrimination in compensation, with includes discretionary and nondiscretionary wages and benefits and describes when employees are similarly employed and a pay differential is allowable based in good faith on bona fide job-related factors.
- Prohibits discrimination related to career advancement opportunities and certain workplace practices related to nondisclosure of wages.
- Requires investigation by Department of Labor and Industries (L&I).
- Provides for remedies, including damages and civil penalties assessed by L&I, and civil action brought by an employee.

SENATE COMMITTEE ON COMMERCE, LABOR & SPORTS

Staff: Susan Jones (786-7404)

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This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Background: The Industrial Welfare Act contains a number of wage and wage-related provisions. One provision, the Equal Pay Act (EPA), provides that an employer who discriminates in the payment of wages as between sexes or who pays any female a lesser wage than males similarly employed is guilty of a misdemeanor. The EPA further provides that if a female receives less compensation because of sex discrimination, she may sue and recover the difference in compensation she should have received. It is a defense that the difference in wages is based in good faith on a factor or factors other than sex.

The Washington Law Against Discrimination, administered by the Human Rights Commission (HRC), also makes it an unfair employment practice to discriminate in compensation because of sex. Under a work-sharing agreement with the Equal Employment Opportunity Commission (EEOC), complaints alleging a violation of the EPA filed with HRC are investigated by the EEOC.

The National Labor Relations Act protects the right of some employees to discuss the terms and conditions of employment.

Summary of Bill: The bill as referred to committee not considered.

Summary of Bill (Proposed Substitute): Equal Pay. The statute prohibiting discrimination in the payment of wages is modified in several respects. The term "gender" is used rather than "sex." Instead of "wages," discrimination in providing "compensation" based on gender is prohibited and continues to provide civil and criminal consequences. Compensation includes discretionary and nondiscretionary wages and benefits. The phrase "similarly employed" is described. Employees are similarly employed if they work for the same employer, the performance of the job requires similar skill, effort, and responsibility, and the jobs are performed under similar working conditions. Job titles alone are not determinative.

A general defense of good faith is removed except where there is a differential in compensation based in good faith on a bona fide job-related factor or factors that: are consistent with business necessity; are not based on or derived from a gender-based differential; and account for the entire differential. The bona fide factors include: education, training, or experience; seniority system; a merit system; a system that measures earnings by quantity or quality of production; or a bona fide regional difference in compensation levels. A differential based in good faith on a local government minimum wage ordinance does not constitute discrimination. An person's previous wage or salary history is not a defense. The employer carries the burden of proof on these defenses.

Advancement Opportunities. An employer may not limit or deprive an employee of career advancement opportunities that would otherwise be available to the employee except for gender, including by failing to: (1) announce or provide access to these opportunities or (2) provide training, on the basis of gender. A differential in career advancement based on a bona fide job-related factors as described above does not constitute discrimination.

Prohibited Workplace Practices. An employer may not:

- require nondisclosure of wages as a condition of employment;
- require an employee to sign a waiver that prevents the employee from disclosing the amount of the employee's wages; or

- discharge or retaliate against an employee for: (1) discussing wages or the wages of any other employee, (2) asking the employer to provide a reason for the employee's wages or lack of opportunity for advancement, or (3) for aiding or encouraging an employee to exercise the employee's rights under the legislation.

An employer may generally prohibit certain employees with access to employee wages from disclosing the wages of the other employees or applicants. An employer may not retaliate, discharge, or discriminate against an employee who has filed any complaint or proceeding, testified in any proceeding, or because of the exercise of any right afforded by the legislation.

L&I Investigation, Assessment, and Civil Penalties. Upon complaint by an employee, L&I must investigate to determine if there has been compliance with the act and rules and may also initiate an investigation on behalf of one or more employees for a violation of this act and rules. The director of L&I (director) must attempt to resolve a violation by conference and conciliation; or if no agreement is reached, the director may issue a citation and notice of assessment and order the employer to pay to the employee actual damages; statutory damages equal to the actual damages or \$5,000, whichever is greater; interest of one percent per month on all compensation owed; payment to L&I of the investigation and enforcement costs; and any other appropriate relief.

The director may also order payment to L&I of a civil penalty of not more than \$500 for a first violation and not more than \$1,000 or ten percent of the damages, whichever is greater, for a repeat violation. For discriminatory advancement opportunity violations, there must be a director's determination of a pattern of or a violation through application of a formal or informal employer policy or practice for an assessment or civil penalty. For civil penalties related to discriminatory advance opportunity, equal pay, and workplace practices violations, the violation as to each affected employee constitutes a separate violation.

An appeal from the director's determination may be taken in accordance with the Administrative Procedures Act. L&I must deposit civil penalties in the supplemental pension fund. An employee who prevails is entitled to costs and reasonable attorneys' fees. Any wages and interest owed must be calculated from four years before the complaint.

Employee Civil Action. An employee may bring a civil action for violations of this act. The employee may be awarded actual damages; statutory damages equal to the actual damages or \$5,000, whichever is greater; interest of one percent per month on all compensation owed; and costs and reasonable attorneys' fees. For discriminatory advancement opportunity violations, the remedies only apply if the court determines there was a pattern of violations as to the employee or a violation through application of a formal or informal employer policy or practice. The court may also order reinstatement and injunctive relief. Any wages and interest owed must be calculated from four years before the civil action was instituted.

A violation of this legislation occurs when a discriminatory compensation decision or other practice is adopted, when an individual becomes is subject to or is affected by a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid.

Employment Posters and Rules. L&I must include notice of the provisions of this legislation in the next reprinting of employment posters. The department may adopt certain rules to implement this act.

Appropriation: None.

Fiscal Note: Available.

Creates Committee/Commission/Task Force that includes Legislative members: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony on Proposed Substitute (Regular Session 2017) (Commerce, Labor & Sports): *Testimony from 2017 Regular Session.* PRO: Our state's EPA has not been updated since 1943. If changes are not made, it will be 2070 before the gap is closed. There continues to be an unfair wage gap of \$0.78 for every dollar earned by men, and for some women of color the gap is \$0.46 for every dollar. Washington once was a leader but now is fourth from the bottom in updating equal pay. Women who are mothers face increased discrimination. Many women have stories about unequal pay and benefits. Men get further and further ahead because of the discrimination in starting salaries. The bill helps remove systemic barriers.

Washington women lost \$11 billion to the wage gap last year. The bill will improve existing law and close loopholes. The administrative remedy makes it easier for individuals, especially low-wage workers. The change to the bona fide defense will make sure reasons are job related. Pay secrecy perpetuates discrimination. Transparency gives women the information they need to know if they are being discriminated against. Equal opportunity is not a burden for employers. Please move this bill and we will continue to work on it.

CON: The bill is confusing, the definitions and legal standards are unclear, as are the remedies. With these definitions the bill is un-implementable. Performance and location of work should be addressed. Reasonable time, place, and manner limits are needed for wage discussions. It can be very difficult to determine less favorable opportunities with shift work. We encourage you to consider the concepts in SB 5344.

OTHER: The notion of a manager determining "less favorable opportunities" is perplexing. It is unclear what kind of documentation an employer would need to show under this bill.

Persons Testifying (Commerce, Labor & Sports): PRO: Senator Annette Cleveland, Prime Sponsor; Janet Chung, Legal Voice; Marilyn Watkins, citizen; Maggie Humphreys, citizen; Cherie Reeves Sperr, YWCA; Lynn Dodson, Washington State Labor Council.

CON: Michael Schutzler, Washington Technology Industry Association; Carolyn Logue, Washington Retail Association; Holli Johnson, Washington Food Industry Association; Bob Battles, AWB.

OTHER: Patrick Connor, NFIB/Washington.

Persons Signed In To Testify But Not Testifying (Commerce, Labor & Sports): No one.

Staff Summary of Public Testimony on Proposed Substitute (Labor & Commerce):

PRO: Washington is a leader in fairness and equality. Some progress has been made since equal pay was passed in 1943 but there continues to be unfair pay, especially for women and women of color. Full-time working women earn 78 cents on the dollar to men. Forty-nine percent of mothers are a sole bread winner; many earning minimum wage and living in poverty. We must continue to implement policies to remove barriers. If we take no further action, we will not achieve pay equity until 2071. A study found male nurses out earn female nurses by nearly \$8,000 per year. Women of color earn much less. However, studies show that with more women in corporate leadership, there are more corporate profits. We need to close the wage gap so that young women will not lose money like the women that came before them. For the economy to succeed, women need to succeed. Local jurisdictions must have the ability to surpass these minimum standards. I learned that my female co-worker made 80 percent of my salary, working about the same job, time with the company, and qualifications (except she had better translation skills). When she asked about it, we were written up. The bill would allow people to stand up and not be reprimanded.

CON: We have concerns about section 8 and double jeopardy, allowing employees administrative and civil court remedies. We prefer the provisions in the Wage Payment Act where the worker is given a choice. A single approach is fair and equitable. Also the bill has a four year look back and there is a three year look back in the Wage Payment Act. It is easier to have one standard. Changes in the bill would make it easier to comply. We would change to "other" if there was relief in section 8.

OTHER: We support the principles, but section 4(2)(a) and (b) have unintended consequences to training meant to assist employees and implies advancement must follow some sort of announcement process. Pre-emption is important. There are four different minimum wage laws. You recognized this in the paid family leave bill. In section 3, is a shift work wage differential acceptable? We appreciate the removal in language in the opportunity section and adding the pattern and practice language. The language in section 4 (2)(a) and (b) are redundant. We appreciate the remedy changes. Employees should not have different rights in the state. Employees and employers need consistency.

Persons Testifying (Labor & Commerce): PRO: Senator Annette Cleveland, Prime Sponsor; Kristin Rowe-Finkbeiner, Moms Rising; Matthew Carouchet, citizen; Lynne Dodson, WSLC; Anna Finkbeiner, citizen; Marilyn Watkins, EOI; Olivia Roskill, citizen; Kathy Barnard, citizen; Sarah Cherin, UFCW 21; Michael Schutzler, CEO, Washington Technology Industry Association.

CON: Patrick Connor, NFIB/Washington.

OTHER: Jo Deutsch, TechNet; Bruce Beckett, Washington Retail Association; Bob Battles, AWB; Carolyn Logue, WFIA.

Persons Signed In To Testify But Not Testifying (Labor & Commerce): No one.